

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1928

No. 4859. **612**

JERRY MAIATICO, APPELLANT,

vs.

RICHARD G. FLETCHER, NELLIE E. FLETCHER,
REAL ESTATE MORTGAGE AND GUARANTY
CORPORATION, WILMER F. STICKLE, TRUSTEE,
ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 18, 1928.

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Court of Appeals of the District of Columbia

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No. 4859.

JERRY MAIATICO, APPELLANT,

vs.

RICHARD G. FLETCHER, NELLIE E. FLETCHER,
REAL ESTATE MORTGAGE AND GUARANTY
CORPORATION, WILMER F. STICKLE, TRUSTEE;
LEWIS E. BREUNINGER, TRUSTEE; MARJORIE
C. BRADT, CHARLES S. SHREVE, TRUSTEE;
RALPH P. BARNARD, TRUSTEE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 4859.

JERRY MAIATICO, Appellant,

vs.

RICHARD G. FLETCHER et al.

a Supreme Court of the District of Columbia.

No. 48049. Equity.

JERRY MAIATICO, Plaintiff,

vs.

RICHARD G. FLETCHER, NELLIE E. FLETCHER, REAL ESTATE Mortgage and Guaranty Corporation, Wilmer F. Stickle, Trustee; Lewis E. Breuninger, Trustee; Majorie C. Bradt, Charles S. Shreve, Trustee; Ralph P. Barnard, Trustee, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill of Complaint.

Filed March 6, 1928.

In the Supreme Court of the District of Columbia, Holding
Equity Court.

No. 48049. Equity.

JERRY MAIATICO, Plaintiff,

vs.

~~RICHARD G. FLETCHER, NELLIE E. FLETCHER, REAL ESTATE
Mortgage and Guaranty Corporation, Wilmer F. Stickle,
Trustee; Lewis E. Breuninger, Trustee; Majorie C.
Bradt, Charles S. Shreve, Trustee; Ralph P. Barnard,
Trustee, Defendants.~~

First. The plaintiff, Jerry Maiatico, states that he is a citizen of the United States and a resident of the City of Washington, District of Columbia, and alleges:

Second. Upon information and belief, that Richard G. Fletcher, is a citizen of the United States and a resident of the City of Washington, District of Columbia.

Third. Upon information and belief, that Nellie E. Fletcher, is a citizen of the United States, and a resident of the City of Washington, District of Columbia.

Fourth. Upon information and belief, that the Real Estate Mortgage and Guaranty Corporation, is a corporation, doing business in the City of Washington, District of Columbia. This plaintiff is not informed as to the citizenship of this corporation.

Fifth. Upon information and belief, that Wilmer F. Stickle, is a citizen of the United States, and a resident of the City of Washington, District of Columbia, and is sued herein as a trustee.

Sixth. Upon information and belief, that Lewis E. Breuninger, is a citizen of the United States and a resident of the City of Washington, District of Columbia, and is sued herein as a trustee.

Seventh. Upon information and belief, that Majorie C. Bradt, is a citizen of the United States and a resident of the City of Washington, District of Columbia.

Eighth. Upon information and belief, that Charles S. Shreve, is a citizen of the United States and a resident of the City of Washington, District of Columbia, and is sued herein as a trustee.

Ninth. Upon information and belief, that Ralph P. Barnard, is a citizen of the United States and a resident of the City of Washington, District of Columbia, and is sued herein as a trustee.

Tenth. The plaintiff, Jerry Maiatico, filed on 8th day of June, 1927, a bill of complaint, to foreclose a mechanic's lien, numbered 9675, and which property is described by metes and bounds as follows:

"Lot 115 in Denison and Leighton Trustee Subdivision
"of parts of tracts of land known as Mt. Pleasant Plain as
"per plat recorded in Liber County 6, Folio 6 of the rec-
"ords of the surveyor of the District of Columbia. Also
"all of lot 124 in Beard and Abbot's subdivision in part
"said Denison and Leighton subdivision and part of Sher-
"mans Subdivision of parts of said tracts of land, as per
"plat recorded in Liber County No. 7, folio 6 of the records
"of the office of the Surveyor of the District of Columbia.
"Also all of lot 623 in Charles H. Armes' Subdivision of
"lots in 'Mt. Pleasant' and 'Pleasant Plains') as per plat
"recorded in Liber 30, Folio 83 of the aforesaid surveyor's
"office records. Also lots 628 and 629 in Charles H.
"Armes' Subdivision of lots in 'Mt. Pleasant Plains' as
"per plat recorded in Liber 23 Folio 188 of the aforesaid
"surveyor's office records."

and which suit is numbered #47,074, in which the following are named as defendants, Harry A. Bramow, Real Estate Mortgage and Guaranty Corporation, Wilmer F. Stickle, Lewis E. Breuninger, W. H. Walker, Harry S. Welch, Jr., Charles E. Marsh, and the District National Securities Corporation. No answer or defense has been filed by or in behalf of the defendant, Harry A. Bramow, judgment pro confesso, was taken, which was made final, on the 28th day of February, 1928. In behalf of the defendants, Real Estate Mortgage and Guaranty Corporation, Wilmer F. Stickle and Lewis E. Breuninger, Trustees, an answer or defense was filed; by Donaldson & Johnson, Vernon
3 E. West, attorneys, which answer or defense was sworn to on the 27th day of September, 1927. In be-

half of the District National Securities Corporation, Harry S. Welch, Jr., and Charles E. Marsh, Trustees, answers or defenses were filed, which answers or defenses were sworn on to wit the 8th and 9th days of August, 1927, filed by Barnard and Johnson attorneys. The plaintiff prayed for relief in his Bill of Complaint as follows:

“Wherefore, the premises considered, the plaintiff prays:

“First. That process may issue against the defendants
“and each of them commanding their appearances herein
“and answer to this Bill of Complaint.

“Second. That if the defendants hereto respectively shall
“not file answers or in answering should fail to state fully
“the matters and things relevant to the plaintiff’s right
“herein concerning which the plaintiff is without full in-
“formation that the plaintiff may have discovery of the de-
“fendants, and the defendants, be required to answer such
“interrogatories as may be filed herein.

“Third. That the Court may decree a sale of the said
“land, premises and improvements and of the interest of the
“defendant Harry A. Bramow, therein as the same existed
“at the time of the commencement of the erection of said
“building; and of the interest of the defendant, Real Estate
“Mortgage and Guaranty Corporation, in such amount as
“may be shown to be subordinate to the plaintiff’s lien, and
“in such amounts as may be established herein, free and
“clear of the lien of the deed of trust now held by the afore-
“said District National Securities Corporation, and the
“proceeds of sale be directed by decree herein to be paid
“to the plaintiff, as may be determined by the Court to be
“entitled thereto.”

That the said answers or defenses, with the names of the attorneys Donaldson and Johnson, Vernon E. West, and Barnard and Johnson, are still of record, and no answer or defense, by any of the defendants filed herein, has been dismissed, and they all are active parties to the suit heretofore filed, entitled Equity No. 47,074.

Eleventh. That subsequently to the filing of the above suit the Trustees, Wilmer F. Stickle, and Lewis E. Breuninger, advertised for sale the property hereinbefore described at what was purported to be a foreclosure sale under the first deed of trust of \$210,000; and to wit on the 15th day of September, 1927, at what was

purported to be the foreclosure sale of the said property, was sold to one, Horace G. Smithy, an officer of the District National Securities Corporation, for the sum of \$220,000. That the said Horace G. Smithy, did not go through with the said purchase.

Twelfth. This plaintiff, is informed and therefore avers, that the said property was purchased in the name of Richard G. Fletcher, a lienor on the aforesaid property, at the purported price of \$220,000, and that the amount of \$10,000, was loaned to the said Fletcher, by or through one of the interested parties in the original suit of foreclosure, entitled Equity Suit #47,074. A deed, dated the 20th day of October, 1927, conveyed the property hereinbefore described, by the Trustees Wilmer F. Stickle and Lewis E. Breuninger, to the purported purchaser, Richard G. Fletcher, and which deed was recorded on November 12, 1927, at 10:32 A. M. in the office of the Recorder of Deeds for the District of Columbia.

Thirteenth. That the defendant, Richard G. Fletcher, and Nellie E. Fletcher, his wife, the purported owners, executed a deed of trust, dated the 20th day of October, 1927, to secure the Real Estate Mortgage and Guaranty Corporation, in the sum of \$210,000. Lewis E. Breuninger, Wilmer F. Stickle, Trustees, payments of principal and interest to be made as therein specified, which deed was recorded on the 12th day of November, 1927, at 10:33 A. M., in the office of the Recorder of Deeds for the District of Columbia. The mortgage for the amount of \$220,000, involves the same property and the same mortgagee, and the same amount, and is the same matter in question in Equity suit No. 47,074.

5 Fourteenth. That the defendants, Richard G. Fletcher, and Nellie E. Fletcher, his wife, executed a deed of trust dated the 24th day of October, 1927, purporting to secure Majorie C. Bradt, for the amount of \$82,000.00, Charles S. Shreve, and Ralph P. Barnard, Trustees, which purported mortgage for \$82,000.00, is a purported second mortgage, the payment of principal and interest to be made as therein specified, which mortgage was filed on the 12th day of November, 1927, at 10:33 A. M., in the office of the Recorder of Deeds for the District of Columbia. The

plaintiff is informed and therefore avers, that Majorie C. Bradt, is an employe of the Fletcher Fireproofing Co., Richard G. Fletcher, President, at a salary, and is not a person of means and therefore is unable to purchase or to loan money of any considerable sum; and is further informed and therefore avers, that Charles S. Shreve, was and is the attorney for Richard G. Fletcher; and that Ralph P. Barnard, is one of the attorneys of record for the District National Securities Corporation, Harry S. Welch, Jr., and Charles E. Marsh, Trustees, the party secured in the sum of \$82,000.00, in Equity Suit, entitled No. 47074.

Fifteenth. That all of the above parties, except R. G. Fletcher, Nellie E. Fletcher, Charles S. Shreve and Majorie C. Bradt, appear in Equity suit entitled No. 47074, either as defendants or as attorneys and which suit is still pending. That all of the above acts, conveyances and deeds of trust and the aforesaid sale, is a subterfuge to defeat the claim and rights of this plaintiff; Jerry Maiatico, and others similarly situated.

Wherefore, the premises considered, the plaintiff prays:

One. That process may issue against the defendants and each of them commanding their appearances
6 herein and answer to this Bill of Complaint.

Two. That if the defendants hereto respectively shall not file answers or in answering should fail to state fully the matters and things relevant to the plaintiff's right herein concerning which the plaintiff is without full information, that the plaintiff may have discovery of the defendants, and the defendants, be required to answer such interrogatories as may be filed herein.

Three. That a receiver or receivers may be appointed by the Court to collect, hold, invest and manage, disburse and account for the rents, income, emoluments and profits of the land and premises set forth in this Bill of Complaint.

Four. That the deed under the purported foreclosure sale to Richard G. Fletcher, and the deeds of Trust, to the Real Estate Mortgage and Guaranty Corporation, and to Majorie C. Bradt, may be set aside, cancelled, declared null and void and of no effect.

Five. That the plaintiff may have such other and further relief, as the nature of the case may require, and to this

Honorable Court may seem just and meet, and the costs and disbursements of this action.

JERRY MAIATICO.

ALFRED CERCEO,
Attorney for Plaintiff.

WASHINGTON, D. C., ss:

Jerry Maiatico, being duly sworn, deposes and says that he is the plaintiff in the within action; that he has
7 read the foregoing Bill of Complaint, and knows the contents thereof; that the same is true to his own knowledge and belief, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JERRY MAIATICO.

Subscribed and sworn to before me this 5th day of March, 1928.

[SEAL.]

ANTON T. CONTELLA,
Notary Public.

Answer of Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt, and Charles S. Shreve, Trustee.

Filed March 21, 1928.

* * * * *

The answer of Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles C. Shreve, trustee, respectfully shows to the court as follows:

The defendant, Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles S. Shreve, for answer to the bill of complaint respectfully state as follows:

11. These defendants say that by deed of trust dated August 27, 1926, and recorded August 30, 1926, in liber 5826, folio 231 of the land records of the District of Columbia, the then owner of the real estate, one Harry A. Bramow, conveyed the said real estate to the defendants, Wilmer F. Stickle and Lewis E. Breuninger, trustees, to secure a series of notes aggregating \$210,000 and interest, payable to the Real Estate Mortgage and Guaranty Corporation.

That said deed of trust was foreclosed by the said
8 trustees, who advertised the property for sale under
the terms of said deed of trust on the 15th day of
September, 1927, and that at said sale, the defendant, Rich-
ard G. Fletcher, was the highest bidder and bid for said
property the sum of \$220,000 through Horace G. Smithy,
who was then and there acting for the defendant, Richard
G. Fletcher, and that the defendant, Richard G. Fletcher,
thereafter fully complied with the terms of said sale and
there was conveyed to him a fee simple title to said prop-
erty, by the said trustees. The only interest and estate
which the plaintiff claimed in said equity cause, No. 47074,
which was in any way in conflict with said first deed of trust
upon said property, was for the difference between the
amount of said first trust, to wit, \$210,000.00, which the Real
Estate Mortgage and Guaranty Corporation had agreed to
advance and the amount which the said Real Estate Mort-
gage and Guaranty Corporation had actually advanced.
These defendants aver that the said Harry A. Bramow
had defaulted in the payments under said deed of trust,
that the sale, as aforesaid, was made in accordance with said
deed of trust, that the plaintiff was present at said sale,
made no protest with respect to said sale or the purchase
price and not until the defendant, Richard G. Fletcher, had
consummated said sale, had taken title to the property
and had spent approximately \$25,000 thereon, did the plain-
tiff in any way indicate that he had any claim upon said
property or any title thereto or any claim therein, that was
paramount to or in conflict with said deed of trust or the
right and title which the defendant, Richard G. Fletcher,
purchased thereunder. These defendants deny that said
sale was a "purported" sale, as set forth in said para-
graph, but say that the same was real and bona fide. They
deny that the property was sold to one, Horace G.
9 Smithy, other than that Horace G. Smithy was then
and there acting for the defendant, Richard G.
Fletcher, to whom the property was sold by the auctioneer.
These defendants say that the auctioneer noted the said
defendant, Richard G. Fletcher, as the purchaser and the
deed was made to him accordingly.

These defendants say that they deny the averments of
paragraph eleven of the bill, save as admitted herein.

12. These defendants say that the property was purchased by the defendant, Richard G. Fletcher, and in fact in his name. That the Fletcher Fireproofing Company, a corporation, of which the defendant, Richard G. Fletcher, is president, had previously proceeded towards the completing of said building at the request of a committee of creditors of said Harry A. Bramow and had an interest therein to the extent of \$4,838.97, which was the difference between the work which it had done to the extent of \$7,638.97, upon which it had been paid \$2,800. That the Fletcher Fireproofing Co. had a claim against the said property and against the said Harry A. Bramow, for work which it had done upon said building for said Harry A. Bramow in a sum in excess of \$20,000 in addition to the aforesaid sum. No lien had been filed on said building by the defendant, Richard G. Fletcher, personally.

13. These defendants deny that Richard G. Fletcher is the "purported" owner of said property and say that he is the real owner thereof. They deny that there is any mortgage upon said property of \$220,000. They deny that the deed of trust recorded November 12, 1927 and referred to in said paragraph, is identical with the deed of trust set forth in paragraph eleven of the bill, save in amounts and property encumbered, and say that the deed of trust referred to in paragraph thirteen is to secure notes of
10 the defendant, Richard G. Fletcher. They deny that the said deed of trust is the same matter referred to in equity suit No. 47074.

14. These defendants say that the defendant, Richard G. Fletcher, after he became the owner of said property, gave a second deed of trust upon the same, that he had the right to do so, that the promissory notes secured by said deed of trust were made payable to Majorie C. Bradt and thereafter endorsed by her, without recourse, and negotiated. They are advised that it is unnecessary for them to further answer said paragraph.

15. These defendants deny that the acts set forth in the bill, conveyance, deeds of trust and the sale alleged therein, were a subterfuge to defeat the claim and rights of this plaintiff and others similarly situated and say that said sale under said deed of trust was because of the default of said

Harry A. Bramow therein and was made under the terms and conditions of said deed of trust and in accordance therewith.

16. Further answering said bill, these defendants say that no claim was made by the plaintiff in equity cause No. 47074 of any lien paramount or prior to the first deed of trust dated August 27, 1926 and recorded August 30, 1926 in liber 5826, folio 231 of the land records of the District of Columbia, to Wilmer F. Stickle and Lewis E. Breuninger, trustees, to secure the Real Estate Mortgage and Guaranty Corporation, except for such sum as had not been advanced under the terms of said deed of trust, which represented a building loan. That a large sum of money had actually been advanced under the terms of said deed of trust as is alleged and shown by the answer of the defendant, Real Estate Mortgage and Guaranty Corporation, in said equity cause No. 47074 and which was fully known to this
11 plaintiff prior to the filing of this suit. That said deed of trust was foreclosed in good faith and the property bought in by the defendant, Richard G. Fletcher, and that the proceeds of said sale were delivered into the hands of the trustees under said deed of trust, who are parties defendant in this cause as well as parties defendant in said equity cause No. 47074.

17. In said equity cause 47074, to wit, on November 9, 1927, the defendant, Richard G. Fletcher, as principal, and the New Jersey Fidelity and Plate Glass Insurance Company, as surety, filed an undertaking, in accordance with section 1254 of the Code of Law for the District of Columbia, that the said undertaking was thereupon approved by the court in that cause and thereupon the court in said cause ordered that the real estate described in the bill in that cause, which is the identical real estate described in the bill in this cause, be and the same was thereby released from the operation of the lien of the plaintiff. These defendants, therefore, say that the plaintiff has no interest in the subject matter of this suit and no lien and interest in the real estate described in the bill.

18. The defendant, Richard G. Fletcher, says that the filing of this suit has clouded this title, that it prevents him — disposing of the building, that the first trust interest at the rate of 6½ per cent per annum is accruing, the interest

on the second trust is accruing, it costs him a large sum of money to pay the running expenses of the building and that this suit is filed without merit and in order to cloud the title, whereas in fact and in deed, plaintiff had all the security to which he was lawfully entitled by the giving of the bond and the discharge of the lien in equity cause No. 47074.

12 Having fully answered, these defendants pray.

1. That the bill be dismissed as to them.

2. That the defendant, Richard G. Fletcher, be given such judgment as may be proper against the plaintiff, Jerry Maiatico, for damages, for the filing of this suit.

RICHARD G. FLETCHER,
NELLIE E. FLETCHER,
MARJORIE C. BRADT,
CHARLES S. SHREVE,

Trustee.

DISTRICT OF COLUMBIA, ss:

Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles S. Shreve, trustee, being first duly sworn on oath depose and say that they have read the foregoing answer by them subscribed, know the contents thereof and verily believe that facts stated therein to be true.

RICHARD G. FLETCHER.
NELLIE E. FLETCHER.
MARJORIE C. BRADT.
CHARLES S. SHREVE.

Subscribed and sworn to before me this 21st day of March, 1928.

[SEAL.]

HUGH M. FRAMPTON,
Notary Public, D. C.

H. WINSHIP WHEATLEY,

*Attorney for Richard G. Fletcher, Nellie E.
Fletcher, Marjorie E. Bradt, Chas. S.
Shreve, Trustee.*

13

Motion for Separate Hearing.

Filed March 21, 1928.

* * * * *

Now come the defendants, Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles S. Shreve,

trustee, by H. Winship Wheatley, their attorney, and move the court under equity rule 28, to set down for separate hearing and to dispose of, before the trial of the principal case, the questions whether the giving of the undertaking by the defendant, Richard G. Fletcher, in equity cause No. 47074, does not release any claim that the plaintiff may have against the property described in the bill of complaint and whether the plaintiff standing by at said sale, without making any protest thereto until after the defendant, Richard G. Fletcher, had bound himself to spend \$220,000. and had actually spent a large sum in addition, as alleged in the answer filed in this cause, and had actually received a deed for said property, does not prevent plaintiff from proceeding with this suit. These defendants respectfully refer to that part of Equity Rule 28, which reads as follows: "Every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing, at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case, in the discretion of the court."

H. WINSHIP WHEATLEY,
*Attorney for Richard G. Fletcher,
Nellie E. Fletcher, Majorie C. Bradt,
and Charles S. Shreve, Trustee.*

To the plaintiff and defendants and their attorneys:

14 Please take notice that I shall call the above motion to the attention of the court on the 23rd day of March, 1928, at 10 o'clock a. m., or as soon thereafter as counsel may be heard.

H. WINSHIP WHEATLEY,
*Attorney for Richard G. Fletcher,
Nellie E. Fletcher, Majorie C. Bradt,
and Charles S. Shreve, Trustee.*

Answer of Defendant Ralph P. Barnard, Trustee.

Filed March 29, 1928.

* * * * *

For answer to the original Bill of Complaint filed herein, the defendant Ralph P. Barnard, Trustee, answering says:

1-2-3-4-5-6-7-8-9. Answering paragraphs one to nine, both inclusive, of the original Bill of Complaint filed herein, this defendant admits the allegations thereof.

10. Answering paragraph ten of said original Bill of Complaint, this defendant says that the allegations therein are a matter of record in this Court and if the same are material the original papers in this case will show whether or not the facts as alleged are true and the defendant therefore neither admits nor denies the same.

11. Answering the eleventh paragraph of said original Bill of Complaint, this defendant says that the Trustees Wilmer F. Stickle and Lewis E. Breuninger advertised the property for sale under the terms of the deed of trust on, to wit, the 15th day of September, 1927, default having been made; that this defendant was present at said sale and on information and belief he says that said property was purchased by Richard G. Fletcher for the sum of Two hundred and twenty thousand dollars (\$220,000.00), the bidding being done by Horace G. Smithy for said Richard G.

15 Fletcher; that the day was propitious and there was a good attendance at the sale and as far as this defendant observed the sale was conducted in a fair and impartial manner and he denies that there was anything about the sale which was unfair to any one.

12. Answering the twelfth paragraph of said original Bill of Complaint, this defendant says that said property was purchased by Richard G. Fletcher and that the amount required to be paid at the time of the sale was Ten thousand dollars (\$10,000.) which amount was paid by the said Richard G. Fletcher. This defendant states that it is immaterial and irrelevant as to who, if any one, loaned said Richard G. Fletcher the sum of Ten thousand dollars (\$10,000.00) to make the above deposit. This defendant admits that the deed conveying the property to said Richard G.

Fletcher was executed by the Trustees Wilmer F. Stickle and Lewis E. Breuninger, but he has no information as to when the deed was recorded and therefore can neither admit nor deny the same.

13. Answering the thirteenth paragraph of said original Bill of Complaint, this defendant, upon information and belief, admits that Richard G. Fletcher and Nellie E. Fletcher, his wife, the owners and not purported owners, executed a deed of trust dated the 20th day of October, 1927, to secure the Real Estate Mortgage and Guaranty Corporation in the sum of Two hundred and ten thousand dollars (\$210,000.00), but this defendant has no information concerning the recording of said deed of trust and can therefore neither admit nor deny the same, but believes the said deed of trust was made a matter of record in the Office of the Recorder of Deeds for the District of Columbia.

14. Answering the fourteenth paragraph of said original Bill of Complaint, this defendant says that the said Richard G. Fletcher and Nellie E. Fletcher, his wife, executed
16 a deed of trust dated the 24th day of October, 1927, to secure Majorie C. Bradt, in the sum of Eighty-two thousand dollars (\$82,000.00), said deed of trust being made to Charles S. Shreve and this defendant as Trustees; that the same was a second deed of trust on the said property sold, subject to Two hundred and ten thousand dollars (\$210,000.00); that this defendant has no information as to when the deed of trust was recorded in the Office of the Recorder of Deeds for the District of Columbia and can therefore neither admit nor deny the same, but he believes said deed of trust was recorded in due time in said Recorder of Deeds' Office.

Concerning the allegation as to Majorie C. Bradt, this defendant has no information concerning her employment or whether or not she is a person of means and can therefore neither admit nor deny the same. This defendant admits that Charles S. Shreve was and is the attorney for Richard G. Fletcher and he admits that he is one of the attorneys of record for the District National Securities Corporation, Harry S. Welch, Jr. and Charles E. Marsh, Trustees, in equity suit No. 47,074.

15. Answering the fifteenth paragraph of said original Bill of Complaint, this defendant states that he is not a party in equity suit No. 47,074, as alleged in said paragraph, but admits that he was one of the attorneys of record for the District National Securities Corporation, one of the defendants mentioned in said equity suit; and this defendant denies that the foreclosure sale under the first deed of trust, as alleged in said Bill of Complaint, is a subterfuge to defeat the claim and rights of the plaintiff, Jerry Maiatico, and others similarly situated, the facts being that the deed of trust was in arrears, default having been made in the payment of the interest and taxes, the maker of the deed of trust Harry A. Bramow had been adjudged

a bankrupt, the property was not productive and
17 in order to protect the interests of the holders of the first trust note there was no alternative but to sell the property under the terms of the deed of trust securing the sum of Two hundred and ten thousand dollars (\$210,000.00), which was done in a regular and lawful manner as far as this defendant is informed and believes, and said property was bought in by the said Richard G. Fletcher who had a perfect right to bid at said sale and he purchased the property in good faith and borrowed the money to make the purchase, paying all cash therefor to the Trustees.

This defendant says that he has read the answer filed herein by Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles S. Shreve, Trustee, and he believes the statements in said answer are true to the best of his knowledge and belief.

And, having fully answered, etc.

RALPH P. BARNARD,

Trustee.

DISTRICT OF COLUMBIA, *To wit:*

I, Ralph P. Barnard, being first duly sworn on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated on information and belief, I believe to be true.

RALPH P. BARNARD.

Subscribed and sworn to before me this 28th day of March, A. D. 1928.

[SEAL.]

JOHN W. WOOD,
Notary Public, D. C.

18 *Joint and Separate Answer of Real Estate Mortgage
and Guaranty Corporation and Wilmer F. Stickle
and Lewis E. Breuninger, Trustees.*

Filed March 30, 1928.

* * * * *

The defendants, Real Estate Mortgage and Guaranty Corporation and Wilmer F. Stickle and Lewis E. Breuninger, Trustees, for joint and separate answer to the bill of complaint filed herein, say:

First. They admit the averments of the first paragraph of the bill of complaint.

Second. They admit the averments of the second paragraph of the bill of complaint.

Third. They admit the averments of the third paragraph of the bill of complaint.

Fourth. They admit the averments of the fourth paragraph of the bill of complaint. Further answering said fourth paragraph, defendants aver that the defendant, Real Estate Mortgage and Guaranty Corporation is a corporation organized under the laws of the State of Delaware.

Fifth. They admit the averments of the fifth paragraph of the bill of complaint.

Sixth. They admit the averments of the sixth paragraph of the bill of complaint.

Seventh. They admit the averments of the seventh paragraph of the bill of complaint.

Eighth. They admit the averments of the eighth paragraph of the bill of complaint.

Ninth. They admit the averments of the ninth paragraph of the bill of complaint.

Tenth. They admit the averments of the tenth paragraph of the bill of complaint.

19 *Eleventh.* Answering the averments of the eleventh paragraph of the bill of complaint, these de-

fendants admit that subsequent to the filing of the suit referred to in the tenth paragraph of the bill of complaint, the trustees, Wilmer F. Stickle and Lewis E. Breuninger, advertised for sale the property described in the said tenth paragraph of the bill of complaint at what was to be a foreclosure sale under the first deed of trust of \$210,000, and that on the 15th day of September, 1927 said property was sold at said foreclosure sale for the sum of \$220,000. These defendants deny that said sale was a "purported" sale, but say that said sale was real and bona fide. They admit that Horace G. Smithy is an officer of the District National Securities Corporation, but deny that said Smithy purchased said property at said foreclosure sale and on the contrary aver that defendant, Richard G. Fletcher, through said Smithy who was then and there acting for the defendant Fletcher, was the highest bidder for said property and bid for the same the sum of \$220,000. These defendants further aver that the auctioneer noted the said defendant Fletcher as the purchaser of said property; that the defendant Fletcher thereafter fully complied with the terms of said sale and the fee simple title to the property was conveyed to him by these defendant trustees.

Twelfth. Answering the averments of the twelfth paragraph of the bill of complaint, these defendants admit that the said property was purchased in the name of said defendant Fletcher at the price of \$220,000, and defendants further aver that the said property was purchased by said defendant Fletcher. These defendants admit that the said property was conveyed by the trustees, Stickle and Breuninger, to the said defendant Fletcher, as set forth in said twelfth paragraph. These defendants are without
20 knowledge respecting the remaining averments of said twelfth paragraph. Defendants further aver that no mechanics' lien has been filed on said building by the defendant Fletcher personally.

Thirteenth. Answering the averments of the thirteenth paragraph of the bill of complaint, these defendants admit that the defendant, Richard G. Fletcher, the owner of the said property, and Nellie E. Fletcher, his wife, executed a deed of trust dated the 20th day of October, 1927 to defendants, Brueninger and Stickle, as trustees, to secure the

defendant, Real Estate Mortgage and Guaranty Corporation, in the sum of \$210,000, payment of principal and interest to be made as specified in said trust which deed was recorded on the 12th day of November, 1927 at 10:33 A. M., in the Office of the Recorder of Deeds for the District of Columbia. These defendants deny the remaining averments of said thirteenth paragraph.

Fourteenth. These defendants admit that defendant, Richard G. Fletcher and Nellie E. Fletcher, his wife, executed a deed of trust dated the 24th day of October, 1927, to Charles S. Shreve and Ralph P. Barnard, trustees, to secure Marjorie C. Bradt in the sum of \$82,000, the payment of principal and interest to be made as therein specified, which deed of trust was filed on the 12th day of November, 1927 at 10:33 A. M., in the Office of the Recorder of Deeds of the District of Columbia. They further admit that Charles S. Shreve was the attorney for defendant, Richard G. Fletcher, and that Ralph P. Barnard is one of the attorneys of record for the District National Securities Corporation, Harry S. Welch, Jr., and Charles D. Marsh, trustees in Equity Suit No. 47,074. These defendants are without knowledge respecting the remaining averments of the fourteenth paragraph of the bill of complaint.

21 *Fifteenth.* These defendants deny that the acts, conveyances, deeds of trust and the sale, set forth in the bill of complaint, are a subterfuge to defeat the claims or rights of plaintiff or others similarly situated and say that said property was sold under said deed of trust because of the default of Harry G. Bramow under the terms and conditions of said deed of trust and in accordance therewith.

Sixteenth. These defendants aver upon information and belief that the plaintiff and his attorney, Alfred Cerceo, were present at said foreclosure sale. These defendants further aver that plaintiff made no protest to any of these defendants with respect to said sale or the purchase price, and made no objection to any of these defendants to the consummation of said sale. These defendants further aver upon information and belief that the defendant, Richard G. Fletcher, subsequent to the conveyance of title to said property to him, has spent in the improving of the same a

large sum of money, to-wit, \$25,000. These defendants, therefore, aver that the plaintiff is guilty of laches.

Wherefore, having fully answered, these defendants pray that they may be hence dismissed with their reasonable costs.

REAL ESTATE MORTGAGE &
GUARANTY CORPORATION,
By L. E. BREUNINGER,

President,

WILMER F. STICKLE,
LEWIS E. BREUNINGER,

Trustees.

DONALDSON & JOHNSON,
VERNON E. WEST,

*Attorneys for Defendants Real Estate Mortgage &
Guaranty Corporation, and Wilmer F. Stickle and
Lewis E. Brueninger, Trustees.*

DISTRICT OF COLUMBIA, ss:

I, Lewis E. Brueninger, being first duly sworn depose
and say that I am President of the Real Estate Mortgage
& Guaranty Corporation, and that I have read the
22 foregoing answer by me subscribed as President of
said corporation, and that the matters and things
therein stated, I verily believe to be true.

LEWIS E. BREUNINGER.

Subscribed and sworn to before me this 29th day of
March, 1928.

[SEAL.]

ALICE L. KELLY,
Notary Public, D. C.

Order Setting Cause for Hearing on Issue.

Filed April 13, 1928.

* * * * *

Upon consideration of the motion of Richard G. Fletcher
filed herein, it is by the court this April 13, 1928, ordered
That there be set down for hearing before this Court on
the 30th day of April, 1928, and disposed of before the trial

of the principal case, under equity rule 28, the following issues:

1. Was the plaintiff's lien or interest in the real estate described in the bill released by the giving of a mechanic's lien, undertaking in equity No. 47074,

2. Is the plaintiff estopped from proceeding in this cause by reason of standing by at the sale, without making protest thereto, as described in the answer of the defendant, Richard G. Fletcher.

WILLIAM HITZ,
Justice.

23 *Amendment to Bill of Complaint.*

Filed May 4, 1928.

* * * * *

Now comes the plaintiff, Jerry Maiatico, leave of Court being first had and obtained, and amends his bill of complaint filed herein, by inserting at the end of the second page of the bill of complaint after the twenty-sixth line of paragraph numbered ten, beginning after the words "on the 28th of February 1928" by inserting and adding the words, "The said Harry A. Bramow, is insolvent."

And in the paragraph numbered thirteenth, the ninth line, by striking the figures \$220,000 from the said line and inserting instead and in lieu thereof, the figures \$210,000.

JERRY MAIATICO,
By ALFRED CERCEO.

ALFRED CERCEO,
Attorney for Plaintiff, Jerry Maiatico.

Fiat.

Let this amendment be filed.

W. H., *Justice.*

I consent.

VERNON E. WEST,
*Atty. for Real Estate Mortgage Co. and
Stickle & Breuninger, Trustees.*

I consent for the Amendment to be made.

RALPH P. BARNARD.

(Here follows motion for receiver, marked page 24.)

MOTION FOR RECEIVER.

Filed June -5 1928

*

*

Now comes the plaintiff in the above entitled cause and moves this Honorable Court, to appoint a receiver to collect and to hold pending the final determination of this cause, the rents and profits collected by Richard G. Fletcher, and those now due and to become due, from premises 3121 16th St., N. W., during the pendency of this cause from the defendant, Richard G. Fletcher, and from the tenants of the said property, by and for the reasons stated in the bill and answers filed in the above entitled cause, for the reasons:

1. That the foreclosure sale under date of September 15, 1927, was unjust, as the amount of interest due was \$458.31, on the money advanced by the Real Estate Mortgage And Guaranty Corporation as appears by the following schedule.

DATE OF ADVANCE	AMOUNT	YEARLY INTEREST	DAYS INTEREST DUE FROM DATE OF ADVANCE.	DAILY RATE DUE	AMOUNT DUE
Sept. 30, 1926	\$23,940.	\$1,556.10	331	\$4.263	\$1,411.05
Oct. 8, 1926	13,965	907.72	323	2.486	802.98
Oct. 15, 1926,	13,965	907.72	316	2.486	785.89
Oct. 21, 1926	11,970	778.05	310	2.131	660.61
Oct. 27, 1926	11,970	778.05	304	2.131	647.82
Nov. 12, 1926	23,940	1,556.10	288	4.263	1,227.74
Nov. 30, 1926	9,000	585.00	270	1.613	435.51
Dec. 9 1926	975	62.38	261	.170	44.37
Dec. 17, 1926	5,000	325.00	253	.892	225.68
Jan. 20, 1927	14,950	971.75	219	2.662	562.98
Feb. 1, 1927	5,000	325.00	208	.892	185.54
Feb. 3, 1927	20,105	1,256.83	205	3.443	705.82
Feb. 10, 1927	4,820	313.30	198	.858	163.88
Mar. 7, 1927	23,000	1,495.00	173	4.096	708.61
Mar. 11, 1927	2,000	130.00	169	.353	59.66
Mar. 28, 1927					\$8,628.14
Interest retained 2/27/27					\$6,825.00
" " 3/28/27					<u>1,345.83</u>
Total interest retained					8,170.83
Interest due					<u>458.31</u>

That the Real Estate Mortgage And Guaranty Corporation held in its hands at the time of the foreclosure sale the amount of \$8,075.00.

25 2. That the said Richard G. Fletcher placed a first deed of trust for \$210,000, and a second deed of trust for the amount of \$82,000.00. The income from the said property will be thereby dissipated.

ALFRED CERCEO,
Attorney for Plaintiff.

Please take notice that the aforesaid motion will come up for hearing Friday June 8, 1927, at 10 A. M. or as soon thereafter as counsel may be heard.

ALFRED CERCEO.

Order Denying Motion to Appoint Receiver.

Filed June 15, 1928.

* * * * *

Upon Consideration of the motion filed herein by the plaintiff, Jerry Miatico, for the appointment of a receiver, it is by the Court this 15th June, 1928, Ordered, that said motion be and the same is hereby denied.

W. HITZ,
Justice.

The plaintiff notes an exception to the above order and an appeal to the Court of Appeals. The bond for costs is fixed at One Hundred Dollars or in lieu thereof a cash deposit of Fifty Dollars.

W. H., *Justice.*

26

Decree.

Filed June 28, 1928.

* * * * *

This cause came on to be heard at this term upon the order passed herein on April 13, 1928, framing issues to be disposed of before the trial of the principal case and thereupon, after testimony in open court and argument by counsel, the court finds the first issue contained in said order in favor of the defendants, and it is according-, this 28th day of June, 1928,

Adjudged, ordered and decreed

That the bill of complaint herein be and the same is hereby dismissed, with costs to be taxed by the Clerk and that the defendants have execution as at law.

JAMES F. SMITH,
Acting Justice.

Exception noted in open court by the plaintiff and plaintiff in open court notes an appeal to the Court of Appeals of the District of Columbia from the above decree, and the cost bond is fixed by the court as \$50 cash or \$100 undertaking.

JAMES F. SMITH,
Acting Justice.

Memorandum.

July 5, 1928.—Undertaking on appeal, \$100, approved and filed.

27 *Assignment of Errors.*

Filed July 16, 1928.

* * * * * *

Now comes the plaintiff, Jerry Maiatico, and assigns for errors that the court erred—

1. The Court erred in dismissing the bill of complaint under Equity Rule 28, because a plea in bar or abatement was not made in the answer as required to be made by the aforesaid rule.

2. The Court erred in its ruling in dismissing the bill of complaint, on the issue framed, of “Was the plaintiff’s lien or interest in the real estate described in the bill released by the giving of a mechanic’s lien undertaking in equity No. 47,074?” Because the bill of complaint was not a suit to foreclose a mechanic’s lien, but was a suit to set aside a fraudulent foreclosure sale, by a judgment creditor.

3. The Court erred in refusing to appoint a receiver upon the motion of the plaintiff, because the sale was improperly made.

ALFRED CERCEO,
Attorney for Plaintiff.

Plaintiff's Designation of Record.

Filed July 16, 1928.

* * * * *

The plaintiff having perfected an appeal to the Court of Appeals of the District of Columbia, in the above entitled cause, the Clerk of this Court is requested to kindly prepare and make part of this transcript of record on appeal in this cause the following papers:

1. Original bill of complaint filed, March 6, 1928.
2. Amendment to original bill of complaint, filed May 4, 1928.
3. Answer of Richard G. Fletcher, Nellie E. Fletcher, Majorie C. Bradt and Charles S. Shreve, Trustee to original bill.
4. Motion for separate hearing under Equity Rule 28, of Richard G. Fletcher, et al, filed March 21, 1928.
5. Order setting date of hearing for April 30, 1928, on the issues framed.
6. Motion of plaintiff, for the appointment of receiver.
7. Order denying motion to appoint receiver, appeal of plaintiff noted in open court.
8. Final decree dismissing bill of complaint, on the first issue contained in order of March 30, 1928.
9. Memo: Appeal of plaintiff, noted in open Court and undertaking on appeal fixed.
10. Bond undertaking on appeal filed, July 5, 1928.
11. Assignment of errors.
12. This designation.

ALFRED CERCEO.

Undertaking to Release.

Filed November 11, 1927.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

No. 47074.

JERRY MAIATICO, Plaintiff,

vs.

HARRY A. BRAMOW et al., Defendant.

Richard G. Fletcher, present owner, and New Jersey Plate Glass & Insurance Company, sureties, all of the District of Columbia, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their heirs, executors, and administrators, or personal representatives, that they will pay and satisfy any judgment or decree that may be recovered in the above mentioned Equity cause, in
29 reference to Mechanics Liens Nos. 9642 & 9673, to enforce the above-entitled mechanic's lien, together with the costs of said proceeding, which judgment or decree they agree may be pronounced against all of them.

Witness our hands and seals this 11th day of November, 1927.

RICHARD G. FLETCHER, [SEAL.]
NEW JERSEY FIDELITY & PLATE
GLASS INS. CO.,

By GEORGE H. PRICE, [SEAL.]
[CORPORATE SEAL.] *Attorney in Fact.*

Approved November 11, 1927.

WILLIAM HITZ, J.

Surety & agent qualified.

FRANK E. CUNNINGHAM,
Clerk,

By HARRY M. HULL,
Ass't Clerk.

In the Supreme Court of the District of Columbia.

Richard G. Fletcher having filed the undertaking required by law with New Jersey Plate Glass & Insurance Company, as sureties, it is this 11 day of November, 1927, ordered, that the real estate in said lien described be, and the same is hereby released from the operation thereof.

WILLIAM HITZ,
Justice.

Undertaking to Release.

Filed November 11, 1927.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

No. 47433.

BARBER AND ROSS, INC., et al., Plaintiff,
vs.

HARRY A. BRAMOW et al., Defendants.

30 Richard G. Fletcher, present owner, and New Jersey Plate Glass & Insurance Company, sureties, all of the District of Columbia, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their heirs, executors, and administrators, or personal representatives, that they will pay and satisfy any judgment or decree that may be recovered in the above mentioned Equity cause, in reference to Mechanics Liens Nos. 9662, 9673, 9681, 9692, 9695, 10244, 10245, 10246, 10247, 10249, 10340, & 10403, together with the costs of said proceeding, which judgment or decree they agree may be pronounced against all of them.

Witness our hands and seals this 11th day of November, 1927.

RICHARD G. FLETCHER, [SEAL.]
NEW JERSEY FIDELITY & PLATE
GLASS INS. CO.,

By GEORGE H. PRICE, [SEAL.]

[CORPORATE SEAL.]

Attorney in Fact.

Approved November 11, 1927.
WILLIAM HITZ, J.

Surety & agent qualified.
FRANK E. CUNNINGHAM,
Clerk,
By HARRY M. HULL,
Ass't Clerk.

In the Supreme Court of the District of Columbia.

Richard G. Fletcher, having filed the undertaking required by law with New Jersey Plate Glass & Insurance Company, as sureties, it is this 11 day of November, 1927, ordered, that the real estate in said lien described be, and the same is hereby, released from the operation thereof.

WILLIAM HITZ,
Justice.

31 *Undertaking to Release.*

Filed November 11, 1927.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

No. 47260.

THOMAS SOMERVILLE Co., Plaintiff,

vs.

HARRY A. BRAMOW et al., Defendants.

Richard G. Fletcher, present owner, and New Jersey Plate Glass & Insurance Company, sureties, all of the District of Columbia, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their heirs, executors, and administrators, or personal representatives, that they will pay and satisfy any judgment or decree that may be recovered in the above mentioned Equity cause, in reference to Mechanic's Lien No. 9681, to enforce the above-entitled mechanic's lien, together with the costs of said proceeding,

which judgment or decree they agree may be pronounced against all of them.

Witness our hands and seals this 11th day of November, 1927.

RICHARD G. FLETCHER, [SEAL.]
NEW JERSEY FIDELITY & PLATE
GLASS INS. CO.,

By GEORGE H. PRICE,
[CORPORATE SEAL.] *Attorney in Fact.*

Approved November 11, 1927.

WILLIAM HITZ, J.

Surety & agent qualified.

FRANK E. CUNNINGHAM,
Clerk,

By HARRY M. HULL,
Ass't Clerk.

In the Supreme Court of the District of Columbia.

32 Richard G. Fletcher, having filed the undertaking required by law with New Jersey Plate Glass & Insurance Company, as sureties, it is this 11 day of November, 1927, ordered, that the real estate in said lien described be, and the same is hereby, released from the operation thereof.

WILLIAM HITZ,
Justice.

Designation of Record of Attorney for Richard G. Fletcher.

Filed July 18, 1928.

* * * * *

The Clerk of the Court will please include in the record on appeal the following documents, in addition to those in the designation of record made by the plaintiff.

1. The answers of all defendants filed in this cause.
2. Order of April 13, 1928.
3. Undertakings of Richard G. Fletcher and surety, filed in Equity causes 47,074 (Maiatico vs. Bramow, et al.) 47,433 (Barber & Ross vs. Bramow, et al.) 47,260 (Somer-

ville vs. Bramow, et al.) and orders of court (Honorable William Hitz, Justice) on the reverse side of each of said undertakings.

H. WINSHIP WHEATLEY,
Attorney for Richard G. Fletcher.

Notice of Service of Settlement of Statement of Evidence.

Filed July 18, 1928.

* * * * *

Please take notice that on the 30 day of July A. D. 1928, at ten (10) o'clock A. M., or as soon thereafter as counsel may be heard, the proposed testimony of the defendants, under Equity Rule 28, attached to this notice, of
33 which proposed testimony of the defendants, a copy is handed to you herewith, will be submitted to the Court to be settled.

ALFRED CERCEO.

Service of copy of the proposed testimony of the defendants, in the above entitled cause, acknowledged this 18 day of July, A. D. 1928.

H. WINSHIP WHEATLEY,
Attorney for the Defendant Fletcher.

Objections to Statement of Evidence, &c.

Filed August 29, 1928.

* * * * *

Now comes the defendant, Richard G. Fletcher, by H. Winship Wheatley, his attorney, and objects to the proposed statement of evidence heretofore tendered in this cause, on the ground that the same is inaccurate and herewith tenders an accurate copy of the statement of evidence, in duplicate, in accordance with said rule, made up from the stenographic transcript of the record.

H. WINSHIP WHEATLEY,
Attorney for Richard G. Fletcher.

Mr. Alfred Cerceo, Attorney for Jerry Maiatico:
Mr. Vernon E. West, Attorney for the Real Estate Mortgage and Guaranty Corporation, Wilmer F. Stickle, Trustee, and Yewis E. Breuninger:
Mr. Ralph P. Barnard:

Please take notice that the above will be called to the attention of the court on the 11th day of September 1928 at 10 o'clock, A. M., or as soon thereafter as counsel may be heard.

H. WINSHIP WHEATLEY,
Attorney for Richard G. Fletcher.

34

Motion to Strike.

Filed September 1, 1928.

* * * * *

Comes now the plaintiff, Jerry Maiatico, in the above entitled cause and moves the court to strike out from the files the purported statement of evidence filed herein by the defendant, Richard G. Fletcher, and each and every line thereof, for the reasons—

I. Said statement is not prepared and filed in accordance with rules of court. The objections or amendments, if any, are to be filed within fifteen days, after the filing of the statement of evidence by the appellant, which this defendant failed to do.

II. The said statement, is not a statement of evidence in conformity with the rules of court.

III. And for other reasons apparent on the face thereof.

ALFRED CERCEO,
Attorney for Plaintiff.

Mr. Winship Wheatley,
Attorney for defendant:

Please take notice that the above motion will be called to the attention of the court on the 11th day of September, 1928, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

ALFRED CERCEO,
Attorney for Plaintiff.

35 *Notice to Submit Evidence for Settlement.*

Filed September 4, 1928.

* * * * *

Please take notice that on the 11th day of September, 1928, at the hour of 10 o'clock A. M. or as soon thereafter as counsel may be heard, the proposed testimony of the defendants, under Equity Rule 28, copy of which was served on you on the 18th day of July, 1928, will be submitted to the Court to be settled.

ALFRED CERCEO,
Attorney for Plaintiff.

Memoranda.

September 18, 1928.—Statement of Evidence signed Justice Bailey.

September 19, 1928.—Statement of Evidence filed.

Order Overruling Motion to Strike.

Filed September 19, 1928.

* * * * *

Upon consideration of the motion of the plaintiff to strike out the statement of evidence heretofore submitted by the defendant Richard G. Fletcher, it is by the Court this 18th day of September, ordered that said motion be and the same is hereby overruled.

JENNINGS BAILEY,
Justice.

36 The plaintiff notes an exception to refusal to strike the statement of evidence from the files and notes an appeal to the Court of Appeals, in open court.

JENNINGS BAILEY,
Justice.

Further Assignment of Errors.

Filed September 21, 1928.

* * * * *

Now comes the plaintiff, Jerry Maiatico, and assigns for further error, that the court erred

1. The court erred in refusing to strike from the files the statement of evidence filed herein by the defendant, Richard G. Fletcher, upon the motion of the plaintiff for the reason that the said statement of evidence was not filed in compliance with the Rules of the Supreme Court of the District of Columbia, and with the Rules of the Court of the Appeals of the District of Columbia.

ALFRED CERCEO,
Attorney for Plaintiff.

Further Designation of Record.

Filed September 21, 1928.

* * * * *

The clerk of this Court is requested to kindly prepare and make part of the transcript of record on appeal in this cause the following additional papers:

1. Notice of service on attorney for defendant, on July 18, 1928, of statement of evidence of the defendant under Equity 28, to be settled, and acceptance by attorney for the defendant.

2. Objections by the defendant Richard G. Fletcher, to statement of evidence filed by the plaintiff and tender of statement of purported evidence by Richard G. Fletcher, and notice of time to be settled, filed August 29, 1928.

3. Motion by the plaintiff, Jerry Maiatico, to strike from the files purported statement of evidence submitted
37 by the defendant Richard G. Fletcher, filed August 29, 1928.

4. Notice of time when statement of evidence submitted by the plaintiff to be settled, filed September, 1928.

5. Order denying motion of the plaintiff, Jerry Maiatico, to strike from the files purported statement of evidence

submitted by the defendant, Richard G. Fletcher, and memorandum of appeal, signed September 19, 1928, by Mr. Justice Jennings Bailey.

6. This designation.

ALFRED CERCEO,
Attorney for Plaintiff.

38 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 37, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 48049 in Equity, wherein Jerry Maiatico is Plaintiff and Richard G. Fletcher, et al., are Defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 17th day of October, 1928.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

39 In the Supreme Court of the District of Columbia,
Holding an Equity Court.

Equity. No. 48049.

JERRY MAIATICO

VS.

RICHARD G. FLETCHER, NELLIE E. FLETCHER, REAL ESTATE
Mortgage and Guaranty Corporation, Wilmer F. Sticle,
Trustee; Lewis E. Breuninger, Marjorie C. Bradt,
Charles S. Shreve, Trustee; Ralph P. Barnard, Trustee.

Statement of the Evidence.

This cause came on to be heard on June 27th, and 28, 1928, before Honorable James F. Smith, acting justice of

the Supreme Court of the District of Columbia. Plaintiff was represented by Alfred Cerceo, the defendants, Richard G. Fletcher, Nellie E. Fletcher, Marjorie C. Bradt and Charles S. Shreve, Trustee, were represented by H. Winship Wheatley; the defendants, Real Estate Mortgage & Guaranty Corporation, Wilmer F. Stickle, Trustee, and Lewis E. Breuninger, were represented by Vernon E. West; the defendant, Ralph P. Barnard, trustee, appeared in proper person. Thereupon the following proceedings were had:

The Court then directed the defendant Fletcher to proceed with the testimony he had in support of the issues. The defendant Fletcher called **Harry M. Hull**, who, being sworn, testified in substance as follows: That he was assistant clerk of the Supreme Court of the District of Columbia and he produced three undertakings, which were offered and read in evidence, signed by Richard G.

40 Fletcher as principal, and the New Jersey Plate Glass Insurance Company, as surety, one of the bonds being entitled in the case of Jerry Maiatico vs. Harry A. Bramow, et al., Equity No. 47074, another entitled in the name of Thomas Somerville vs. Harry Bramow, et al., Equity No. 47260 and another entitled in the case of Barber & Ross vs. Harry A. Bramow, et al., Equity No. 47433. He testified that these were part of the record of the Clerk's Office of the Supreme Court of the District of Columbia, and are the identical undertakings of which copies have been made and as shown in the transcript of record to be filed in the Court of Appeals, simultaneous with this statement of evidence. The witness identified the signature of Honorable William Hitz, Associate Justice of the Supreme Court of the District of Columbia on the reverse side of the undertakings. The documents aforesaid were instruments by which Fletcher and the surety appeared and submitted to the jurisdiction of the Supreme Court of the District of Columbia and undertook for themselves and each of them to pay and satisfy any judgment or decree which might be entered in the cause in which they were entitled and the order of Justice Hitz, was "that the real estate in said lien described be and the same is hereby released from the operation thereof", the same being the

real estate in this case. The court asked if any suit had been filed on these bonds, to which counsel replied that it had been filed before the bonds were given and that the bonds had been given in the suits and that no judgment had been rendered on these suits as yet. Mr. Cerceo stated to the court that a judgment had been rendered against Bramow and the court said that he was talking about Fletcher. He asked if any judgment had been rendered on those bonds against anybody, to which counsel for Fletcher responded "No." The witness also produced a power of attorney authorizing the agent of the bonding company to sign the bond, which was offered in evidence. At the close of the examination of witness, counsel for plaintiff moved to strike out the testimony, which the court over-
41 ruled. Counsel for the plaintiff thereafter stipulated that Price was the agent of the bonding company had authority to sign and did sign these bonds as the agent of the bonding company. Counsel for Fletcher then offered the following documents:

Deed of Trust dated August 27, 1926, recorded August 30, 1926 from Harry A. Bramow, et ux. to Wilmer F. Stickle and Lewis E. Breuninger, trustees, to secure the Real Estate Mortgage and Guaranty Corporation, the sum of \$210,000 for money loaned and reciting that the said Bramow had executed his forty two notes in the aggregate sum of \$210,000 with interest.

Deed dated October 20, 1927, from Wilmer F. Stickle and Lewis E. Breuninger, trustee, to Richard G. Fletcher, recorded November 12, 1927, and conveying the property to Richard G. Fletcher, "default having been made in the payment of the debt described in the deed and deed of trust from Hary A. Bramow and Sadye Bramow, his wife, to said parties," the said deed being the identical deed next heretofore described. The said deed recited "the said partis hereto of the first part, in strict execution of the trust declared in said deed of trust, by direction of the party thereby secured and after due and previous public advertisement, as therein provided, made sale at public suction * * * on September 15, 1927, in which the said party of the second part who was the highest bidder therefor became the purchaser thereof at and for the sum of \$220,000."

Deed of trust from Richard G. Fletcher and Nellie E. Fletcher, his wife, to Lewis E. Breuninger and Wilmer F. Stickle, dated October 20, 1927, recorded November 12, 1927, to secure the Real Estate Mortgage and Guaranty Corporation, \$210,000, and reciting that Richard G. Fletcher had executed and delivered certain promissory notes in said sum and desired to secure the same on the real estate described therein.

The real estate described in each of these conveyances was the identical real estate described in the bill of complaint.

The Court: The Real Estate Mortgage and Guaranty Company had the original deed of trust?

Mr. Wheatley: Yes, sir. They had the original deed and notes signed by Bramow. They sold out under that, the amount of the same was \$220,000. Of the \$220,000 Fletcher paid \$10,000.00 (round figures) in cash, and gave a new deed of trust signed by himself, making himself personally liable for \$210,000.00.

The Court: And that paid the whole interest and the costs of the proceedings?

Mr. Wheatley: Yes, Fletcher parted with \$220,000.

42 **Adam A. Weschler**, being sworn as a witness on behalf of Fletcher testified as follows:

He is an auctioneer, that he held the sale for the Royal Arms Apartments, known as 3121 16th St., N. W. Said sale had been advertised in the Evening Star. The sale had been made September 15, 1927. That the purchaser was Richard G. Fletcher. The amount of the bid was \$220,000. That the bid was made through H. G. Smithy. That he made a memorandum of it in his own hand writing. The memorandum was offered in evidence. The memorandum in substance showed that the property had been sold to Richard G. Fletcher for \$220,000. *be* being the highest bidder therefor, through H. G. Smithy. Title good or no sale, and taxes should be adjusted to date of sale. The expenses of advertising in the Star had been \$149.60, postage \$3, auctioneer's fee \$100. On cross examination the witness testified that the terms of sale were to be one third of the purchase money to be paid in cash, the balance in two equal installments, represented by the promissory notes of the

purchaser, payable in one and two years, with interest at 6½% per annum from the date of sale, payable semi-annually, secured by deed of trust upon the property sold or by all cash, at the option of the purchaser. A deposit of \$10,000 was required of the purchaser at the time of sale, all conveyancing and recording and notarial fees would be at the cost of the purchaser and the terms of the sale were to be complied with within thirty days from the date of sale, otherwise, the trustee reserved the right to resell the property, at the risk and cost of the defaulting purchaser. Witness did not know whether one third of the purchase money had been paid in cash.

H. G. Smithy, witness produced on behalf of the defendant Richard G. Fletcher, being first sworn, testified in substance as follows:

43 That he was a real estate broker. Vice President and Treasurer of N. L. Sansbury Company, Incorporated. He attended the sale of the Royal Arms Apartments and was the identical man who was named in Mr. Weschler's paper which he produced, as a bidder upon the property for Richard G. Fletcher. That he was present at the time of the sale and made the bid. That he made the bid for Richard G. Fletcher. That he had been authorized by Mr. Fletcher to do so. That he knew the plaintiff, Jerry Maiatico. Was under the impression that Maiatico was present at the sale. At least, that was his best recollection. No protest was made by Maiatico or anyone else at that time. He never heard any protest about the sale, prior to the filing of the suit. On cross examination witness admitted he never before purchased anything for Richard G. Fletcher.

Hugh M. Frampton, a witness on behalf of the defendant Fletcher, testified as follows:

He is a member of the bar of this court. Was present at the sale of the Royal Arms Apartments under the deed of trust described above. He knows the plaintiff, Jerry Maiatico. He was present at the sale. So was Mr. Cerceo, his counsel. No protest was made in the presence of the witness by Mr. Maiatico or Mr. Cerceo to the sale. Witness talked with Maiatico at the time of the sale and

he never heard of any complaint about the sale by either of them. Maiatico said nothing about protesting to the sale, had no complaint to make about it. He also talked to Cerceo. Cerceo said nothing about having any complaint.

Robert E. Hazell, being sworn on behalf of the defendant, Richard G. Fletcher, testified as follows:

He is bookkeeper for the Real Estate Mortgage and Guaranty Company. He had a record of the notes secured by the trust dated October 20, 1927, secured by the mortgage for \$210,000 and signed by Richard G. Fletcher. The Real Estate Mortgage and Guaranty Company had them and sold them. That it sold all but about \$25,000. Practically \$180,000 had been sold. The notes had been sold to two dozen or more persons. Had been endorsed by the Mortgage Company.

Counsel for Fletcher then offered in evidence the proceedings in equity cause 47074, entitled Jerry Maiatico vs. Harry A. Bramow, Real Estate Mortgage & Guaranty Corporation, Wilmer F. Stickle, trustee, Lewis E. Breuninger, trustee, W. H. Walker, Harry S. Welsh, trustee, Charles E. Marsh, trustee, District National Securities Corporation, the answers of each of the defendants, the undertaking of Richard G. Fletcher and the New Jersey Plate Glass Insurance Co., heretofore described, the motion of Richard G. Fletcher, to be admitted as party defendant, order granting the motion and answer of Richard G. Fletcher, the motion of Richard G. Fletcher that this cause be consolidated with equity cause 47433 and 47260, the order granting the consolidation, the order pro confesso against the defendant, Bramow, and final order pro confesso against the trustee in bankruptcy of Bramow and record showing that no process had been served upon the trustee in bankruptcy.

The bill of complaint aforesaid was a bill of complaint by the said Jerry Maiatico to enforce a mechanic's lien against the real estate described in the bill in this cause for \$6,985 and interest from January 22, 1927 and alleged in substance, "That on the 30th day of August, 1926, said defendant, Harry A. Bramow, being then the owner of the aforesaid property, commenced the work of erecting an

apartment house on said property. The said Domenico Lentine, had contracted with the said Bramow to furnish labor and materials and to do plastering and stucco work on said building. That on the 15th day of November, 1926, Domenico Lentine began to perform the labor and services in connection with the preparation of the plans for said

45 building, that on the 13th day of November 1926 Domenico Lentine, in pursuance of his contract with said Harry A. Bramow made delivery of materials on said premises for the said building and thereafter, during the period from the 15th day of November, 1926 and the 29th day of January, 1927 from time to time delivered materials and furnished labor for the erection of said building pursuant to the contract and fully performed his undertakings in that regard, whereby there was a balance due Lentine of the amount aforesaid, which he had assigned to Maiatico, who had thereafter filed a mechanic's lien therefor. The court, on objection of counsel for Maiatico, declined to allow the proceedings in evidence.

The court said: This man purchased this property under the first deed of trust. Under Section 1254, I think it is, he found a mechanic's lien after it was purchased. He had a right to release that lien by giving an undertaking, or paying the cash. He gave the undertaking. Consequently, the mechanic's lien does not cut any figure."

The defendant, Richard F. Fletcher, thereupon rested.

The plaintiff, Maiatico, was asked by the court to offer such evidence as he had and saie he had none.

After argument, the court found the first issue in favor of the defendant, Richard G. Fletcher, and signed the decree accordingly.

The above is the substance of all the evidence.

And the undersigned Justice, being satisfied that the above contains a fair statement of fact and evidence taken in said case, does hereby sign and seal the above statement of evidence now for then, this 18th day of September, 1928, the Honorable James F. Smith having died since the decree.

JENNINGS BAILEY, [SEAL.]

Justice.

46 [Endorsed:] Equity No. 48049. Jerry Maiatico vs. Richard G. Fletcher et al. Statement of evidence. Submitted Sept. 11, 1928. — —, Justice. H. Win-

ship Wheatley, Attorney and Counsellor at Law, Denrike Building, 1010 Vermont Avenue N. W., Washington, D. C., Attorney for Defendant Fletcher. Filed Sept. 19, 1928. Frank E. Cunningham, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4859. Jerry Maiatico, appellant, vs. Richard G. Fletcher et al. Court of Appeals, District of Columbia. Filed Oct. 18, 1928. Henry W. Hodges, clerk.

(4634)

~~MAR 16 1929~~

Henry W. Hodges
IN THE
Court of Appeals of the District of Columbia

OCTOBER TERM, 1928

No. 4859

JERRY MAIATICO, APPELLANT,

vs.

RICHARD G. FLETCHER ET AL., APPELLEES

BRIEF FOR RICHARD G. FLETCHER, NELLIE
E. FLETCHER, MARGERY C. BRADT AND
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H. WINSHIP WHEATLEY,
Attorney for Richard G. Fletcher et al.

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**BRIEF FOR RICHARD G. FLETCHER, NELLIE
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CHARLES S. SHREVE, APPELLEES**

STATEMENT OF FACTS

On September 15, 1927, Richard G. Fletcher purchased the apartment house in question under a deed of trust sale, by which he had the option of paying one-third cash and the balance in installments, or all cash, at the option of the purchaser (Rec. 35, 36 and 8). He paid \$10,000 in cash and gave notes for \$210,000, signed by himself, with a deed of trust to

secure the notes, acceptable to the holders of the first trust, which had been foreclosed (Rec. 34, 35).

Throughout the appellant's brief this sale is termed a "fake" foreclosure (Appellant's Brief 2-7 *et al.*); yet there is not a scintilla of evidence in the record to support any such statement. In fact, no evidence was offered by the appellant whatsoever (Rec. 38), but the whole of his brief is filled up with groundless and irrelevant invectives and charges of fraud about which he offered no evidence and which in fact is shown by this record never existed. A complete and full statement of the circumstances under which Fletcher purchased the property is set forth in his answer (Rec. 7 *et seq.*) and fully supported by the evidence (Rec. 32 *et seq.*) so far as the issues would permit and the court would allow (Rec. 37).

The appellant Maiatico had previously filed a suit, to-wit, Equity No. 47074, to enforce a mechanic's lien against Bramow, the prior owner of the property; two other suits had also been filed (Rec. 37) having similar objects; Fletcher was not a party to any of these suits at the time they were filed, and could not have been, because he had no title to the property at that time (Rec. 37, 38 and 9). Fletcher, after purchasing the property, filed an undertaking in each of these causes to release the mechanics' liens (Rec. 24, 25 and 26), and the liens were released by order of Court (Sec. 1254, D. C. Code). These undertakings had a bonding company as surety, and by them Fletcher and his surety undertook "that they will pay and satisfy any judgment or decree that may be recovered" in said equity

suit; that is, if there was any right to a lien against the said realty in the equity suit that Fletcher and his surety would see that it was paid.

For fear that there may be some misunderstanding about the nature of this undertaking, it should be said here that it is the contention of the appellees that the bond is to cover whatever rights Maiatico had against the property only, and that the bond stands only in place of the property, the lien upon which has been released by order of court. If there was any right to the \$8,000 from the mortgage company, as contended by appellant under the doctrine of the *Anglo-American Building Association vs. Campbell*, 13 Apps. 58 (Apps. Brief 9), that can be readily urged in the mechanic's lien suits, and there seems to be no disposition on the part of the mortgage company to contend otherwise, as it has paid into the Registry of the Court below this sum of money in the consolidated mechanic's lien cases for such distribution as to the Court may seem just. Whatever Maiatico's rights were in that suit can be urged there.

In none of these equity suits had any challenge been made of the first deed of trust under which Fletcher purchased (Rec. 8).

Maiatico was apparently not satisfied with the security that had been given to him in the first suit and brought this proceeding. He made no mention whatsoever in the bill in this cause of the bonds which he had received for the protection of his liens, but made extravagant and untrue charges that the trustees under the trusts for \$210,000, which Bra-mow had given, advertised the property "at what

purported to be a foreclosure sale" (Rec. 4), and that it was sold at "what was purported to be a foreclosure sale of said property" (Rec. 5) to one Horace G. Smithy, and that Smithy did not go through with the purchase. The slightest investigation, even on inquiry from the auctioneer, would have shown that his memorandum of sale showed that the property had been sold to Fletcher for \$220,000; that he was the highest bidder, and that the sale was made through H. G. Smithy (Rec. 35); that the foreclosure was the due foreclosure of the first deed of trust (Rec. 34), against which no challenge had been made in the previous suit filed by Maiatico.

The bill further alleged that Fletcher had purchased the property in such manner as to leave an inference of some sinister purpose. Fletcher answered the averments with a clear, precise statement of the exact facts (Rec. 7-11), and at the trial offered evidence tending to show in a clear and precise manner exactly what had occurred (Rec. 32-39).

The filing of the bill in this case, of course, created a *lis pendens* and prevented any alienation or incumbrance of the property during its pendency. Trial on the facts could not be had, of course, for several years because of the congestion in the calendar of the court below, and during that time the suit prevented any possible alienation or incumbrance of the property by Fletcher, no matter what might be the injustice to Fletcher (Rec. 11).

The original mechanic's lien suit, filed by Maiatico, has not yet come to trial because of the length of the calendar of the court below, and when reached and

tried the justice in that case can be determined, but it is respectfully submitted that in equity, good conscience, justice and fair play one ought not to be permitted by the filing of a suit of this kind to tie up the alienation of property when whatever rights he has can be determined in a suit in which he has received ample security for whatever might be his just rights.

In the answer of these defendants a full statement of facts was made to the Court and the Court was asked (Rec. 12) to set down the cases for hearing on special issues in advance of the trial, under Equity Rule 28, reading as follows:

“Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, non-joinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer; *and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the Court.* Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the Court.”

The part which is underscored is that upon which these defendants relied in pressing their motion.

The Court granted this motion (Rec. 19, 20) and the matter came on for hearing before Justice Smith

and was determined by him (Rec. 21, 22) the day before he passed away. The statement of evidence was settled by one of the other Justices of the Court. The gravamen of the court's decision was that Fletcher had purchased the property under a deed of trust and that he had done all that justice and equity required him to do when he had given a bond in the former mechanic's lien therein.

ARGUMENT.

THE HEARING UNDER EQUITY RULE TWENTY-EIGHT.

The appellant has treated this subject under the title "Assignment One."

Equity Rule 28 was designed, it seems to the appellees, to cover a situation almost identical with the case at bar. Demurrers and pleas were abolished, every point of law going to the whole or material part of the cause of action might be called up and disposed of before final hearing in the discretion of the court. It was this discretion to which the appellees appealed in making the motion (Rec. 11, 12), and about which the appellant complains under this assignment. Appellant seems to regard the answer as presenting a Plea in Abatement or a plea in confession and avoidance, which it is not. It is respectfully submitted that it is not necessary for the point of law to be tantamount to a formal plea in equity, but even if it should be the situation was met by the answer that was filed.

The answer (Rec. 10) set forth that whatever rights Maiatico had had been released by the ap-

proval of the bonds that had been filed in the other cases, and that the lien had been released by the Court's order.

The plea in bar that is mentioned in the rule is evidently the former plea in equity, which, in substance, set up a single fact that would defeat the plaintiff's claim. That was the situation in the case at bar.

On 21 Corpus Juris 455, it is said:

“A plea has been defined to be a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred. Its proper office is to bring forward some one distinct matter of fact which is a complete defense to the whole bill or to some distinct part of it to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large.” * * *

In *Wagenhurst vs. Wineland*, 22 Appeals D. C. 363, it is said:

“For whatever shows that there is no right which can be made the foundation of a suit or decree therein for the plaintiff may constitute the subject of a plea. And, unlike a demurrer, one of its main objects is to bring upon the record such new matter as has not been shown or relied on by the plaintiff, as will preclude him from the discovery as well as the relief that may be sought by the bill. The plea demands the judgment of the Court in the first instance, whether the special matter urged by it does or not debar the plaintiff from the title to an answer that the bill requires to be made. If the plaintiff conceives the plea to be de-

fective in form or substance, he may take the judgment of the court upon its sufficiency; and so may the defendant interposing the plea, and thus have its sufficiency determined before proceeding further with the defense. * * *

One of the great benefits of a plea is that it intercepts, in an early stage, a cause which must ultimately end in nothing if the pleas be adjudged good and sufficient. It is, therefore, of great importance, in most cases, that a defendant should not, by any slip or mistake, lose the benefit of his plea, or allow himself to be deprived by it, by any mere technical nicety. For these reasons he may be allowed to amend the plea, so as to make it as effectual as the nature of the case will allow."

In *Farley vs. Kittson*, 120 U. S. 303, it is said:

"But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence, at large."

See also *Hopkins' Federal Equity Rules*, Rule 29, p. 184.

It is respectfully submitted that if the giving of the bond was decisive of the case there is no good reason why the Court should postpone a hearing of the matter for two years, which would be utterly destructive of the rights of the defendants, as shown in the eighteenth paragraph of the answer (Rec. 10, 11); and the frittering away of the Court's time in hearing a lengthy case, which could be determined

by one issue, with consequent additional clogging of the calendar. If the giving of this bond was decisive of the case, why should the Court take up the time to hear the rest of it?

It is respectfully submitted that the giving of the mechanic lien bonds in the former case, and the release of the lien by order of Court (Rec. 24, 27, incl.) was a release of any lien that Maiatico had upon this property, and since he had not set this fact up in his bill in this cause, it was necessary for these defendants to set it up in the answer—tantamount to a plea in equity—and that the proof of this fact was, and of right ought to have been the end of that Maiatico's alleged claim here, because any interest he had in the property had been merged in the bonds which had received the Court's sanction.

THE FORECLOSURE SALE.

This subject is treated by the appellant under the title "Assignment Two."

His contention is that the sale under the deed of trust was fraudulent; that he, as a judgment creditor, had a right to challenge it; that he was not limited in his remedies, but could avail himself of one or more, and that the real test is whether he had an adequate remedy in the former case.

With much of his argument the appellees have no difference. It is vehemently denied that there was any fraud in this sale, and no evidence of any kind was offered of any such fraud, but if there had been the appellant was not only required to show that fraud, but to show how he had been damaged. It will not do for one who has no interest in property, or whose rights have been released by order of Court,

to come in with a hue and cry of fraud, unfounded and unjust, and undertake to have the court to inquire into the details of such matters without showing what right he has in it.

The appellant's claim to being a judgment creditor is based entirely upon that part of his bill (Rec. 3) which alleges: "The plaintiff, Jerry Maiatico, filed on the 8th day of June, 1927, a bill of complaint to foreclose a mechanic's lien * * * which suit is No. 47,074 * * * No answer or defense has been filed by or on behalf of the defendant, Harry A. Bramow; judgment *pro confesso* was taken, which was made final on the 28th of February, 1928." (Rec. 3.)

No further details with respect to this final decree *pro confesso* are shown in the record except (Rec. 37) the offer of the proceedings in that equity cause, to wit, 47,074, made by counsel for the appellees and which was excluded on the objection of counsel for the appellant. It was an order *pro confesso* against the defendant, Bramow, and a final order *pro confesso* against the trustee in bankruptcy of Bramow, the record showing that no process had been served upon said trustee in bankruptcy.

The order to which he refers could not have been a final order for the payment of money against Bramow, as the personal judgment referred to in Sec. 1258 of the D. C. Code requires that a sale be made under the mechanic's lien suit before there can be a personal judgment for the deficiency and the appellant has nowhere averred that there has been any such sale, and the fact is that there has not been. There is not even a prayer on the first bill for a personal judgment against Bramow (Rec. 4). The or-

der which the appellant now stresses was that the bill be taken *pro confesso* and that *pro confesso* was made final against Bramow's trustee in bankruptcy. There was no judgment for a recovery of money such as the appellant now urges and upon which his whole argument is predicated.

In the very suit in which he contends that he obtained a decree *pro confesso* against Bramow he has ample security for the payment of any claim that he can justly maintain against the building, that is, if his mechanic's lien was good against the building, it is good now; if it was not good against, it is not good now. Surely the judgment that he claims to have had is not such a judgment as would enable him to do more than to enforce his mechanic's lien.

Appellee's submit that the appellant has mistaken entirely the nature of his bill. His claim is not predicated upon this uncertain judgment, but upon his right to enforce a mechanic's lien which has been released by order of court.

It is a curious fact that although the appellant is strenuously arguing here that he has a judgment, his bill neither shows the amount of the judgment nor the amount of the claim he has. It might have been demurrable upon this ground alone had not the extravagant charges that he claimed of fraud required an answer.

MOTION FOR THE APPOINTMENT OF A RECEIVER

The appellant treats this subject under "Assignment Three."

If the decree of the Court below was correct, there is no occasion for this court to concern itself with

an interlocutory motion for a receiver *pendente lite* (Rec. 21), which was made and overruled in the Court below. If the decree was wrong, that is perhaps another question. If the plaintiff has any rights, he had them under the undertaking that was given and there is surely no occasion for appointing a receiver of the apartment house to pay his claim, when bond has been given and his lien released.

If there is any balance remaining in the mortgage company's hands, which he has the just right to pursue under the Anglo-American Building Association case, as contended in the appellant's brief, a motion for a receiver might lie in the other cause for that sum, but even that has been paid into the Registry of the Court in the consolidated mechanic's lien cases for the benefit of those who are entitled to it.

It is not to be assumed from this statement that the said Richard G. Fletcher concedes that the sum of \$8,075 in the hands of the Real Estate Mortgage and Guaranty Company belongs to any other person than to the said Richard G. Fletcher, owing to the fact that he completed the building as surety on the bond of Harry Bramow, the builder, at a cost to the said Richard G. Fletcher of about \$25,000 (Rec. 19).

It is certainly not apparent from this record where the appellant gets the abundance of figures set forth in the motion that he made, and they are certainly unsupported by anything appearing in this record. The deed to Fletcher (Rec. 34) was the usual deed on its face, given by trustees to foreclose a deed of trust, and the figures which counsel laboriously put into the record are supported neither by the oath of anyone, by anything that appears in the record,

or by any fact in the case. The motion seems to be a part of the same general policy that is pursued in the bill to harass these defendants with continued litigation rather than to wait until the mechanic's lien cases came to trial and are heard on their merits.

It is respectfully submitted that the disparity between the appellant's claim and the value of the building ought alone to be sufficient reason for denying a motion of the kind that appellant has made.

SETTLEMENT OF THE STATEMENT OF THE EVIDENCE

The appellant has treated this subject under "Assignment Four."

He contends that the Court should not have settled the statement of the evidence. In this connection an order has been left out of the record, signed by Justice Gordon, reading as follows:

"Upon consideration of the motion by the defendant, Richard G. Fletcher, it is by the Court this 20th day of July, 1928,

"ORDERED

"That the time for the submission of the statement of the evidence by the plaintiff be and the same is hereby extended until September 15th, 1928.

"PEYTON GORDON,
"Justice."

If this order is deemed necessary or material to the settlement of this matter the appellees suggest that a writ of certiorari issue to bring it up.

The appellants prepared an inaccurate statement of the evidence. Must the Court sign such a state-

ment under any condition? In the final analysis that is the question to be determined. The order of Justice Gordon was not quite as broad as it was thought to have been. It was entered during the summer recess to postpone a settlement of the statement of the evidence until Court and counsel might return in the Fall. The trial justice, in settling the statement of the evidence, concluded that he was not required to sign an inaccurate statement, no matter what appellant's contention might be to the effect that he was bound to sign the statement that the appellant had submitted, right or wrong. It is respectfully submitted that the rules of court dealing with this subject are directory and not mandatory, and the Court should not be required to sign an inaccurate statement, no matter what appellant contends about it.

Lindsey vs. Pa. R. R. Co., 26 Apps. D. C. 125.

Johnson-Wynne Co. vs. Wright, 28 Apps. D. C. 379.

U. S. *ex rel.* Mulvihille vs. Claybaugh, 21 Apps. 440.

Taylor vs. Leesnitzer, 220 U. S. 90.

The Court below, in order to settle the statement of the evidence, had recourse to the stenographic report of the trial, and had that before him when he settled the statement of the evidence, and it is only fair to say that the statement of evidence is a mere transposition of questions and answers into narrative form with a brief of the documents that were offered in order to conform to the rules of this court.

Where would the striking of the statement of the evidence leave the appellant? From the appellees'

viewpoint they would prefer the evidence in the record that the Court may see that the whole transaction was open and above board and that they have nothing to fear and nothing to hide, but it is incumbent upon the appellant to satisfy this Court that the Court below erred. The case was heard in the court below on evidence adduced in that court (Rec. 21). Unless there is evidence in the record, *i. e.*, unless he shows what evidence was admitted, he surely cannot contend that there was error.

CONCLUSION

This suit, it is respectfully submitted, was decided correctly by the trial judge, and the decree should be affirmed.

Respectfully submitted,

H. WINSHIP WHEATLEY,
Attorneys for Richard G. Fletcher et al.